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No. 83-1396

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALFRED L. EASTERDAY, PETITIONER

v.

DONALD W. COYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner, the second drawee in a federal oil and gas lease offering, challenges the court of appeals' decision that the first drawee is entitled to the lease in question.

1. a. Pursuant to Section 17(c) of the Mineral Lands Leasing Act, 30 U.S.C. 226(c), if the Secretary of the Interior decides to lease a parcel of public land that is not within any known geological structure of a producing oil or gas field, "the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding." For a time, the government followed the literal words of the statute. As oil and gas increased in value, however, it became impractical for Interior to administer a race-to-the-land office system. See *Thor-Westcliffe Development, Inc.* v. *Udall*, 314 F.2d 257 (D.C. Cir.), cert. denied, 373 U.S.

951 (1963). In response to that problem, the Secretary issued regulations under which all noncompetitive oil and gas lease applications for a given parcel are deemed to have been filed simultaneously. 43 C.F.R. 3112.2-1.[1]

Under these regulations, offerors are required to file their lease applications on entry cards. Three cards are drawn at random for each lease offering, and the lease is issued to the first-drawn applicant (43 C.F.R. 3112.2-1(a)(3)), provided, among other things, that the first drawee meets all regulatory requirements. If the applicant whose card is drawn first is not qualified, or if his card is not completed in the manner specified in the regulations, the second drawee is selected. If none of the first three drawees is qualified, no lease is awarded. If the Secretary decides to reoffer the tract for leasing, a new drawing is held (43 C.F.R. 3112.5-1).

b. Respondent Resource Service Company (RSC) is a filing service in the business of assisting, for a fee, persons interested in acquiring noncompetitive oil and gas leases. Until 1978, RSC's standard service agreement gave RSC the right to participate in its clients' disposition of any leases obtained in simultaneous oil and gas lease drawings. Interior advised RSC that this provision of the service agreement violated the "sole party-in-interest" and "multiple filing" regulations (43 C.F.R. 3102.7, 3112.5-2). (These regulations are set out in full at Pet. 4-6.) In an attempt to avoid having its clients' first-drawn offers disqualified, RSC responded to this advice by filing "disclaimers," in which it disclaimed its rights as set forth in the service agreement. Pet. App. A3-A4.

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[1]Unless otherwise noted, all C.F.R. references in this memorandum are to the 1977 edition of the Code, which contains the regulations in force during the period relevant to this case.

Petitioner Easterday,[2] the second drawee for the lease in question, protested the qualifications of respondent Coyer, an RSC client whose offer was drawn first. Petitioner contended that RSC's disclaimer was ineffective to cure the violations of the regulations contained in the service agreement and that the lease should be awarded to Easterday as second drawee (Pet. App. A5). The Interior Board of Land Appeals (IBLA) and the district court agreed, holding that RSC's disclaimer, which was not communicated to Coyer and was not supported by any consideration, was ineffective to cure the regulatory violations (*id.* at A5-A6).

c. The court of appeals reversed (Pet. App. Al-Al0). Relying on a case raising the same issue, *Lowey* v. *Watt*, 684 F.2d 957 (D.C. Cir. 1982), the court of appeals held that, as a matter of contract law, RSC's disclaimer was effective to eliminate the prohibited interests in its client's lease offer created by its original service agreement.[3] Thus, respondent Coyer was determined to be qualified to hold the lease in question.

2. Petitioner contends (Pet. 20-3l) that the court of appeals' decision failed to grant sufficient deference to the Secretary's determination that RSC's disclaimer was ineffective. Petitioner also argues (*id.* at 33-4l) that the court of appeals' decision will prevent the Secretary from properly administering the simultaneous oil and gas leasing program in the future. Neither contention warıants further review.

While we disagree with the court of appeals' decision that RSC's disclaimer was effective to cure the regulatory violations and believe, like petitioner, that the court should have

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[2]We are advised that Easterday, the only petitioner in this case, died on May 25, 1980.

[3]The same issue is pending in *Geosearch, Inc.* v. *Clark*, petition for cert. pending, No. 83-1480.

shown greater deference to the Secretary's interpretation of his own regulations, the court's ruling was, after all, as much an interpretation of contract law as of the Secretary's regulations. Moreover, the decision is one of very limited effect. The Department of the Interior has amended its regulations to make clear its long-held view that service agreements such as RSC's violate the "sole party-in-interest" and "multiple filing" regulations. See 43 C.F.R. 3112.5-1 (1983). Thus, service agreements such as RSC's may no longer be used at all, so that the issue whether such agreements may be "disclaimed" will not arise again. In these circumstances, further review is unnecessary. See *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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